

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 11, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP2548-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2010CF22

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH M. THOMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Joseph Thomas appeals from a judgment convicting him of repeated sexual assault of the same child and from a circuit court order denying his postconviction motion alleging ineffective assistance of trial counsel for not filing a motion to suppress Thomas's statements and for

poorly advising Thomas at the time he entered his guilty plea. The circuit court also denied Thomas's motion for resentencing. We affirm the circuit court.

¶2 Thomas was charged with one count of repeated sexual assault of the same child, a Class B felony with a maximum sixty-year term. WIS. STAT. § 948.025(1)(d) (2009-10); WIS. STAT. § 939.50(3)(b) (2009-10). The charge arose from at least three incidents of sexual activity with a six-year-old female family member. The child reported that Thomas touched her genitals, which Thomas later admitted in a police interview. Thomas also admitted that he had the child touch his penis. After taking Thomas's guilty plea, the circuit court imposed a seventeen-year sentence (seven years of initial confinement and ten years of extended supervision).

¶3 Postconviction, Thomas sought to withdraw his guilty plea due to ineffective assistance of trial counsel because counsel did not move to suppress Thomas's inculpatory statements and poorly advised him as he considered whether to plead guilty. Thomas also sought resentencing because the circuit court considered factors outside of Thomas's control, i.e., that the victim had been sexually abused by others.

¶4 The circuit court denied Thomas's postconviction motions. The court determined that Thomas was not in custody when he made his inculpatory statements, he willingly spoke with the detective, and he was not coerced. Because there was no basis under *Miranda*¹ to suppress Thomas's statements, trial counsel was not deficient for failing to file a motion to suppress. The court also

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

denied Thomas's motion to withdraw his guilty plea and found that its sentence was based on proper factors and was not excessive. Thomas appeals.

¶5 We first address whether trial counsel performed deficiently when he failed to seek suppression of Thomas's inculpatory statements. At the postconviction motion hearing, Thomas attempted to prove that he was in custody when he made his inculpatory statements and therefore counsel had a basis for filing a motion to suppress. The following evidence was adduced at the postconviction motion hearing. Thomas was living in Michigan in December 2009 when Michigan State Police served a search warrant on his trailer home. Thomas admitted that his memory of that day was a bit hazy due to the passage of time. During their testimony, Detective Conklin and Thomas agreed on the following: the detective asked Thomas to step outside the trailer; the detective offered his nearby, unmarked police vehicle as a place to talk because Thomas's trailer was very cluttered and it was cold outside; the detective repeatedly told Thomas he was not going to arrest him; Thomas was not restrained in any way; and the detective did not make any show of force or brandish his weapon while he and Thomas spoke in the vehicle. At all times when he was in the detective's vehicle, Thomas understood that he was not under arrest.

¶6 Detective Conklin testified that Thomas sat in the front passenger seat. The detective assured Thomas that he was not being arrested and told him he was free to leave. The vehicle's doors were not locked, and Thomas never asked to leave the vehicle. Thomas and the detective spoke for approximately forty-five minutes. Once Thomas mentioned that he might want to speak with an attorney, Detective Conklin gave Thomas his *Miranda* rights. Even though Thomas admitted to sexual activity with the child, he was not arrested that day.

¶7 Thomas's trial counsel testified that he spoke with Thomas about the advantages and disadvantages of filing a motion to suppress. Counsel did not believe a suppression motion would be successful. Counsel also believed that challenging Thomas's inculpatory statements could be viewed as a failure to take responsibility for his conduct, which would be at odds with a strategy to take responsibility as a means to mitigate the eventual sentence. Counsel and Thomas discussed trial strategy if Thomas were to suppress his inculpatory statements. The decision to forego a motion to suppress was made after counsel and Thomas discussed the issues.

¶8 We agree with the circuit court that a motion to suppress would not have succeeded because Thomas was not in custody when he spoke with the detective and he was neither coerced nor pressured. A person is in custody for *Miranda* purposes if, under the totality of the circumstances, a reasonable person in that situation would not feel free to terminate the interview and depart. *State v. Lonkoski*, 2013 WI 30, ¶6, 346 Wis. 2d 523, 828 N.W.2d 552, *cert. denied*, 571 U.S. ___, 187 L. Ed. 2d 185 (2013). Factors relevant to the totality of the circumstances include the defendant's freedom to leave; the purposes, place, and length of the interview; and the degree to which the defendant was restrained. *Id.*

¶9 The circuit court's findings that Thomas willingly spoke with the detective and was not coerced are not clearly erroneous. *See id.*, ¶21. At all times when he was in the detective's vehicle, Thomas understood that he was not under arrest, and he never claimed that he was not free to exit the vehicle. In addition, there were no other indicia that Thomas was restrained during the forty-five-minute interview or that he suffered from any compelling pressure in the situation. *State v. Torkelson*, 2007 WI App 272, ¶18, 306 Wis. 2d 673, 743 N.W.2d 511. Under the totality of the circumstances, a reasonable person in

Thomas's position would not have considered himself in custody. For that reason, a motion to suppress would not have been successful, and trial counsel did not perform deficiently in failing to file such a motion. *State v. Wheat*, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to raise a legal challenge is not deficient if the challenge would have been rejected).

¶10 We turn to Thomas's claim that trial counsel did not properly advise him regarding the consequences of pleading guilty. Although the circuit court did not make findings of fact in support of its denial of Thomas' motion to withdraw his guilty plea due to ineffective assistance of counsel, we may infer that it found counsel's testimony on this claim credible. *State v. Quarzenski*, 2007 WI App 212, ¶19, 305 Wis. 2d 525, 739 N.W.2d 844 (if the court does not make express credibility findings, we assume the court made implicit findings based on the credibility of the witnesses as the court analyzed the evidence to reach its decision).

¶11 Thomas must establish that he was prejudiced by his counsel's performance. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). Thomas and trial counsel testified that they discussed that if Thomas did not plead guilty, the State could file five additional charges against him, exposing him to a seventy-five-year term due to the mandatory minimum sentences accompanying those offenses. The charged offense, while a Class B sixty-year felony, did not expose Thomas to a mandatory minimum sentence.² Trial counsel cited a brief conversation with a prosecutor as a basis for the assessment he shared with Thomas. The potential exposure to additional charges and prison time motivated Thomas to plead guilty.

² The circuit court imposed a seventeen-year sentence.

¶12 Thomas has not demonstrated that he was prejudiced by counsel's advice regarding his guilty plea. The State could have charged Thomas with additional crimes carrying mandatory minimum sentences, as counsel warned him. Counsel and Thomas assessed the risk, and Thomas decided to plead guilty. We see no ineffective assistance of counsel.

¶13 Finally, Thomas challenges his allegedly excessive sentence. Thomas faced sixty years; he received seventeen. Thomas argues that at sentencing, the circuit court held him responsible for sexual abuse of the victim by others. Thomas complains about the following remarks at sentencing:

This child has been so mistreated I can't even begin to think about it. You, as a child, were molested. She, as a child, is molested. She comes to live with her grandmother, and I don't know if she got molested at the grandmother's house or somebody else's house, but she gets molested at that house. Then her uncle molests her. And throughout this whole thing the poor child is having all these mental issues, being placed, as a six year old, into a mental facility because of her rage and anger. Well, the only thing I have ever seen in 20 years on this bench of kids having that rage and anger is people molested them. Six year old kids don't need mental institutions unless they're being mistreated. Then she gets to Milwaukee Psychiatric and a 16 year old rapes her. What a heck of a life this kid has had. What a heck of a life. And an uncle who wants to teach her about sex. What a lucky little girl. Disgusting. Absolutely disgusting.

The court continued, "I don't know whatever is going to become of her ever, a six year old child that has to go to a mental health institution because now three people have molested her in six years, seven years maybe now. Just amazing. The damage is unbelievable."

¶14 Postconviction, the circuit court found that its sentence was not excessive and that it sentenced Thomas based on his own conduct, his

rehabilitative needs, and the need to protect the public. The court found that it did not sentence Thomas for the conduct of others.

¶15 We reject Thomas's premise that the circuit court held him responsible for the acts of others. At sentencing, the circuit court considered appropriate factors. See *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In fashioning the sentence, the court considered the extreme seriousness of the offense, Thomas's character and rehabilitative needs, and the need to protect the public. The court rejected Thomas's suggestion that anyone other than he was responsible for his conduct with the victim. In the excerpts about which Thomas complains, the circuit court was referring to the effect on the victim of the sexual abuse of which Thomas played a substantial part. That the circuit court mentioned other instances of abuse does not undermine the sentence which clearly and appropriately focused on Thomas's conduct and the sentencing factors relevant to him. Thomas did not meet his burden to show that the circuit court actually relied upon an improper factor at sentencing. *State v. Harris*, 2010 WI 79, ¶¶3, 32-35, 326 Wis. 2d 685, 786 N.W.2d 409. The sentence was not excessive.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

